

- (2) Respondent contends the Administrative Law Judge erred in his finding relating to the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of parties, the Appeals Board finds and concludes:

(1) The fringe benefits were properly included in accordance with K.S.A. 44-511. Respondent asks the Appeals Board to hold that fringe benefits cannot be included in calculations of the average weekly wage because of the provisions of the Employee Retirement Income Security Act ("ERISA"), 29 USC sec. 1001 et seq, as construed in District of Columbia v. Greater Washington Board of Trade, 113 S.Ct. 580, 121 Law Ed. 2d 513 (1992) pre-empts all state laws and regulations relating to employee benefits. The Appeals Board had previously considered this issue and held in Richardson v. Wichita Arms, Inc., Docket No. 176,396 (August 1994) that inclusion of fringe benefits in the average weekly wage, as mandated by K.S.A. 44-511 is not the type of rule or regulation intended to be pre-empted by ERISA. The Kansas Appellate Courts have not ruled to the contrary and accordingly the Appeals Board continues to adhere to its originally stated position and finds, in this case, that fringe benefits may and should be included in the average weekly wage. Accordingly the Appeals Board finds claimant's average weekly wage was, as found by the Administrative Law Judge, \$533.22.

(2) The Appeals Board finds the claimant should be entitled to benefits based upon a forty-six percent (46%) permanent partial general body disability.

The Administrative Law Judge found claimant suffered a forty-two percent (42%) permanent partial general body disability. Respondent argues that claimant should be limited to functional impairment or, in the alternative, a lesser work disability. Respondent argues that the award should be limited to functional impairment only because respondent tried on three separate occasions to provide accommodated work for the claimant. The Appeals Board agrees that the evidence reflects the respondent made a good faith effort to provide employment to the claimant after the injury. The Appeals Board also finds, however, that in spite of respondent's efforts to accommodate, claimant was unable to perform the duties of the comparable wage position. Claimant testified that he was unable to perform the duties and his testimony is adequately supported by the testimony of Dr. Anderson and other evidence in the record. Claimant underwent surgery for a herniated disc in his low back. According to claimant, his condition was worse after surgery than before. The MRI done post-surgery indicates disk bulging at three levels. From a review of the record the Appeals Board finds that claimant's injury prevented his return to comparable wage employment. The presumption against work disability found in K.S.A. 44-510e does not apply. The vocational testimony substantiates a significant work disability.

Respondent also argues that other factors in the record support a work disability less than an average of the physicians and vocational experts. Specifically, respondent points to the FCE, psychological testing done and failed efforts at work hardening. The functional capacity evaluation does not, however, as respondent suggested at oral argument, support the contention that claimant was exaggerating his symptoms. The MMPI testing was done in part to determine whether he might be malingering. The results reflect some other characteristics that might be relevant to the evaluation of his complaints

but do not indicate malingering. The record also indicates claimant withdrew from work hardening. The Appeals Board finds credible, however, his testimony that he was unable to perform the work hardening assignments. Dr. Anderson testified that he found that difficulty consistent with the complaints and did not believe the work hardening was appropriate for claimant's condition. Finally, the respondent attempts to discredit Dr. Anderson on the basis of his testimony that there appears to be a fusion which, according to respondent does not exist. The Appeals Board does not read Dr. Anderson's testimony as an indication that there has been a surgical fusion. Rather, it appears Dr. Anderson is testifying that some fusion is occurring between the vertebra. There is nothing in the record to contradict or suggest that testimony is inaccurate or otherwise reflects on his credibility.

The Administrative Law Judge has given equal weight to each of the vocational experts and their opinions based upon each of the two physicians. Based upon the record as a whole, the Appeals Board finds the method followed by the Administrative Law Judge to be a reasonable one.

The Appeals Board finds, however, that an adjustment is required to account for the average weekly wage of \$533.22. Both vocational experts used a lower average weekly wage when calculating their loss of ability to earn a comparable wage. Karen Terrill projected claimant to be able to earn \$8 an hour post-injury. Compared to his pre-injury wage this gives a loss of ability to earn a comparable wage of forty percent (40%). Jerry Hardin projected a post-injury wage of \$280 which, when compared to a pre-injury wage of \$533.22, is a forty-seven percent (47%) loss of ability to earn a comparable wage. By giving both equal weight the Appeals Board finds claimant has a forty-two and one-half percent (42.5%) loss of ability to earn a comparable wage. When the loss of ability to earn a comparable wage is given equal weight with the forty-nine and one-half percent (49.5%) loss of access to the open labor market, the result is a forty-six percent (46%) work disability, which the Appeals Board finds to be an appropriate basis for the award in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 10, 1994, shall be and is modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Willie Crump, and against the respondent, Evcon Industries, and its insurance carrier, St. Paul Fire & Marine Insurance Company, for an accidental injury which occurred April 21, 1992 and based upon an average weekly wage of \$533.22, for 34 weeks of temporary total disability compensation at the rate of \$289 per week or \$9,826.00, followed by 381 weeks at the rate of \$163.53 per week or \$62,304.93 for a 46% permanent partial general body impairment of function, making a total award of \$72,130.93

As of February 27, 1995, there is due and owing claimant 34 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$9,826.00, followed by 115 weeks of permanent partial disability compensation at the rate of \$163.53 per week in the sum of \$18,805.95 for a total of \$28,631.95 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$43,498.98 is to be paid for 266 weeks at the rate of \$163.53 per week, until fully paid or further order of the Director.

Unauthorized medical expense of up to \$350.00 is ordered paid to claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 80% against the respondent and 20% against the Worker's Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Preliminary Hearing	\$163.20
Transcript of Regular Hearing	\$200.20
Don K. Smith & Associates Deposition of Wilton Anderson, D.O.	\$238.75
Deposition of Jerry Hardin	\$440.00
Satterfield Reporting Services Transcript of Regular Hearing (Cont'd)	\$175.60
Deposition of Robert Eyster, M.D.	\$131.20
Deposition of Karen Terrill	\$ 89.60

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vincent Burnett, Wichita, KS

Kenneth Stevens, Wichita, KS
Randall C. Henry, Hutchinson, KS
John D. Clark, Administrative Law Judge
George Gomez, Director